2007

Foothill Park, LLC v. Judston Inc. : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS

Foothill Park, LLC
Plaintiff /Appellee

vs.

Judston Inc. Defendant/Appellant

ON APPEAL FROM THE UTAH FOURTH DISTRICT COURT, AMERICAN FORK DEPARTMENT, UTAH COUNTY
The Honorable Derek P Pullan

APPELLANT'S OPENING BRIEF

Appellate Case No. 20070353-CA

Trial Case No. 060102680

JUDSTON, Inc. a Utah Corporation
Counterclaimant and
Third Party Plaintiff

North Star Companies, Inc. a Utah Corporation
Third Party Defendant

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PARTIES

The caption of the case contains the names of all the parties.

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JURISDICTION

The Utah Court of Appeals has jurisdiction under Utah Code Ann. Sec. 78-2-2(3)(j).

STATEMENT OF THE ISSUES

1. Is the timely filing by a person claiming benefits under Utah Code Ann. § 38-1- et. seq., of a notice of claim for a mechanics lien under Utah Code Ann. § 38-1-7, barred when said person has previously filed a notice of claim for a mechanics lien under Utah Code Ann. § 38-1-7 for the same work but did not file any action to enforce the previously filed notice of claim within the time limits set by Utah Code Ann. §38-1-11.

Standard of Review: Matter of Law reviewed for correctness. *MacFarlane v. State Tax Comm'n,* 2006 UT 25, ¶¶ 9, 134 P.3d 1116., *State v. Pena*, 869 P.2d 932, 936 (Utah 1994).

Preservation for Appeal: This issue was properly preserved for appeal having been ruled upon by the Trial Court . (Record 00197)

Standard of Review: Matter of Law reviewed for correctness. *MacFarlane v. State Tax Comm'n,* 2006 UT 25, ¶¶ 9, 134 P.3d 1116., *State v. Pena*, 869 P.2d 932, 936 (Utah 1994)

2. Are procedures under Utah Code Annotated §38-9-1 et. seq. (Wrongful Lien Statue) applicable for expedited disposition of a lien claim filed pursuant UCA § 38-1- 1 et seq. (Mechanic's Lien Statue).

Preservation for Appeal: This issue was properly preserved for appeal having been ruled upon by the Trial Court . (Record 00197)

Standard of Review: Matter of Law reviewed for correctness. *MacFarlane v. State Tax Comm'n,* 2006 UT 25, ¶¶ 9, 134 P.3d 1116., *State v. Pena*, 869 P.2d 932, 936 (Utah 1994).

DETERMINATIVE STATUES

Utah Code Ann. **sec. 38-1-3. Those entitled to lien -- What may be attached.**

"Contractors, subcontractors, and all persons performing any services or furnishing or renting any materials or equipment used in the construction, alteration, or improvement of any building or structure or improvement to any premises in any manner and licensed architects and engineers and artisans who have furnished designs, plats, plans, maps, specifications, drawings, estimates of cost, surveys or superintendence, or who have rendered other like professional service, or bestowed labor, shall have a lien upon the property upon or concerning which they have rendered service, performed labor, or furnished or rented materials or equipment for the value of the service rendered, labor performed, or materials or equipment furnished or rented by each respectively, whether at the instance of the owner or of any other person acting by his authority as agent, contractor, or otherwise except as the lien is barred under Section **38-11-107** of the Residence Lien Restriction and Lien Recovery Fund Act. This lien shall attach only to such interest as the owner may have in the property. "

Utah Code Ann sec. 38-1-7(2005). Notice of claim -- Contents -- Recording -- Service on owner of property.

"(1) (a) (i) Except as modified in Section **38-1-27**, a person claiming benefits under this chapter shall file for record with the county recorder of the county in which the property, or some part of the property, is situated, a written notice to hold and claim a lien within 90 days after the date of final completion of the original contract under which the claimant claims a lien under this chapter.

(ii) For purposes of this Subsection (1), final completion of the original contract, and for purposes of Section **38-1-33**, final completion of the project, means:
(A) if as a result of work performed under the original contract a permanent certificate of occupancy is required for the work, the date of issuance of a permanent certificate of occupancy by the local government entity having jurisdiction over the construction project;
(B) if no certificate of occupancy is required by the local government entity having jurisdiction over the construction project, but as a result of the work performed under the original contract an inspection is required as per state-adopted building codes for the work, the date of the final inspection for the work by the local government entity having jurisdiction over the construction project; or
(C) if with regard to work performed under the original contract no certificate of occupancy and no final inspection are required as per state-adopted building codes

by the local government entity having jurisdiction over the construction project, the date on which there remains no substantial work to be completed to finish the work on the original contract.
(b) Notwithstanding Section **38-1-2**, where a subcontractor performs substantial work after the applicable dates established by Subsections (1)(a)(ii)(A) and (B), that subcontractor's subcontract shall be considered an original contract for the sole purpose of determining:
(i) the subcontractor's time frame to file a notice of intent to hold and claim a lien under this Subsection (1); and
(ii) the original contractor's time frame to file a notice of intent to hold and claim a lien under this Subsection (1) for that subcontractor's work.
(c) For purposes of this chapter, the term "substantial work" does not include:
(i) repair work; or
(ii) warranty work.
(d) Notwithstanding Subsection (1)(a)(ii), final completion of the original contract does not occur if work remains to be completed for which the owner is holding payment to ensure completion of that work.
(2) (a) The notice required by Subsection (1) shall contain a statement setting forth:
(i) the name of the reputed owner if known or, if not known, the name of the record owner;
(ii) the name of the person:
(A) by whom the lien claimant was employed; or
(B) to whom the lien claimant furnished the equipment or material;
(iii) the time when:
(A) the first and last labor or service was performed; or
(B) the first and last equipment or material was furnished;
(iv) a description of the property, sufficient for identification;
(v) the name, current address, and current phone number of the lien claimant;

(vi) the amount of the lien claim;
(vii) the signature of the lien claimant or the lien claimant's authorized agent;
(viii) an acknowledgment or certificate as required under Title 57, Chapter 3, Recording of Documents; and
(ix) if the lien is on an owner-occupied residence, as defined in Section **38-11-102**, a statement describing what steps an owner, as defined in Section **38-11-102**, may take to require a lien claimant to remove the lien in accordance with Section **38-11-107**.
(b) Substantial compliance with the requirements of this chapter is sufficient to hold and claim a lien.
(3) (a) Within 30 days after filing the notice of lien, the lien claimant shall deliver or mail by certified mail a copy of the notice of lien to:

(i) the reputed owner of the real property; or
(ii) the record owner of the real property.
(b) If the record owner's current address is not readily available to the lien claimant, the copy of the claim may be mailed to the last-known address of the record owner, using the names and addresses appearing on the last completed real property assessment rolls of the county where the affected property is located.
(c) Failure to deliver or mail the notice of lien to the reputed owner or record owner precludes the lien claimant from an award of costs and attorneys' fees against the reputed owner or record owner in an action to enforce the lien.
(4) The Division of Occupational and Professional Licensing shall make rules governing the form of the statement required under Subsection (2)(a)(ix). "

Utah Code Ann. (2007) 38-1-11. Enforcement -- Time for -- Lis pendens -- Action for debt not affected -- Instructions and form affidavit and motion.

(1) As used in this section:
(a) "Owner" is as defined in Section **38-11-102**.
(b) "Residence" is as defined in Section **38-11-102**.
(2) A lien claimant shall file an action to enforce the lien filed under this chapter within 180 days from the day on which the lien claimant filed a notice of claim under Section **38-1-7**.
(3) (a) Within the time period provided for filing in Subsection (2) the lien claimant shall file for record with the county recorder of each county in which the lien is recorded a notice of the pendency of the action, in the manner provided in actions affecting the title or right to possession of real property, or the lien shall be void, except as to persons who have been made parties to the action and persons having actual knowledge of the commencement of the action.
(b) The burden of proof is upon the lien claimant and those claiming under the lien claimant to show actual knowledge under Subsection (3)(a).
(4) (a) A lien filed under this chapter is automatically and immediately void if an action to enforce the lien is not filed within the time required by this section.
(b) Notwithstanding Section **78-12-40**, a court has no subject matter jurisdiction to adjudicate a lien that becomes void under Subsection (4)(a).
(5) This section may not be interpreted to impair or affect the right of any person to whom a debt may be due for any work done or materials furnished to maintain a personal action to recover the debt.
(6) (a) If a lien claimant files an action to enforce a lien filed under this chapter involving a residence, the lien claimant shall include with the service of the complaint on the owner of the residence:
(i) instructions to the owner of the residence relating to the owner's rights under Title 38, Chapter 11, Residence Lien Restriction and Lien Recovery Fund Act; and

(ii) a form to enable the owner of the residence to specify the grounds upon which the owner may exercise available rights under Title 38, Chapter 11, Residence Lien Restriction and Lien Recovery Fund Act.
(b) The instructions and form required by Subsection (6)(a) shall meet the requirements established by rule by the Division of Occupational and Professional Licensing in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act.
(c) If a lien claimant fails to provide to the owner of the residence the instructions and form required by Subsection (6)(a), the lien claimant shall be barred from maintaining or enforcing the lien upon the residence.
(d) Judicial determination of the rights and liabilities of the owner of the residence under this chapter and Title 38, Chapter 11, Residence Lien Restriction and Lien Recovery Fund Act, and Title 14, Chapter 2, Private Contracts, shall be stayed until after the owner is given a reasonable period of time to establish compliance with Subsections **38-11-204**(4)(a) and (4)(b) through an informal proceeding, as set forth in Title 63, Chapter 46b, Administrative Procedures Act, commenced within 30 days of the owner being served summons in the foreclosure action, at the Division of Occupational and Professional Licensing and obtain a certificate of compliance or denial of certificate of compliance, as defined in Section **38-11-102**.
(e) An owner applying for a certificate of compliance under Subsection (6)(d) shall send by certified mail to all lien claimants:
(i) a copy of the application for a certificate of compliance; and
(ii) all materials filed in connection with the application.
(f) The Division of Occupational and Professional Licensing shall notify all lien claimants listed in an owner's application for a certificate of compliance under Subsection (6)(d) of the issuance or denial of a certificate of compliance.
(7) The written notice requirement applies to liens filed on or after July 1, 2004.

Utah Code Ann. § 38-9-1. Definitions.

As used in this chapter:
(1) "Interest holder" means a person who holds or possesses a present, lawful property interest in certain real property, including an owner, title holder, mortgagee, trustee, or beneficial owner.
(2) "Lien claimant" means a person claiming an interest in real property who offers a document for recording or filing with any county recorder in the state asserting a lien or other claim of interest in certain real property.
(3) "Owner" means a person who has a vested ownership interest in certain real property.
(4) "Record interest holder" means a person who holds or possesses a present, lawful property interest in certain real property, including an owner, titleholder, mortgagee, trustee, or beneficial owner, and whose name and interest in that real

property appears in the county recorder's records for the county in which the property is located.
(5) "Record owner" means an owner whose name and ownership interest in certain real property is recorded or filed in the county recorder's records for the county in which the property is located.
(6) "Wrongful lien" means any document that purports to create a lien or encumbrance on an owner's interest in certain real property and at the time it is recorded or filed is not:
(a) expressly authorized by this chapter or another state or federal statute;
(b) authorized by or contained in an order or judgment of a court of competent jurisdiction in the state; or
(c) signed by or authorized pursuant to a document signed by the owner of the real property.

Utah Code Ann. § 38-9-2. Scope.

(1) (a) The provisions of Sections **38-9-1**, **38-9-3**, **38-9-4**, and **38-9-6** apply to any recording or filing or any rejected recording or filing of a lien pursuant to this chapter on or after May 5, 1997.
(b) The provisions of Sections **38-9-1** and **38-9-7** apply to all liens of record regardless of the date the lien was recorded or filed.
(2) The provisions of this chapter shall not prevent a person from filing a lis pendens in accordance with Section **78-40-2** or seeking any other relief permitted by law.
(3) This chapter does not apply to a person entitled to a lien under Section **38-1-3** who files a lien pursuant to Title 38, Chapter 1, Mechanics' Liens.

Utah Code Ann. § 38-9-7. Petition to nullify lien -- Notice to lien claimant -- Summary relief -- Finding of wrongful lien -- Wrongful lien is void.

(1) Any record interest holder of real property against which a wrongful lien as defined in Section **38-9-1**
has been recorded may petition the district court in the county in which the document was recorded for summary relief to nullify the lien.
(2) The petition shall state with specificity the claim that the lien is a wrongful lien and shall be supported by a sworn affidavit of the record interest holder.
(3) (a) If the court finds the petition insufficient, it may dismiss the petition without a hearing.
(b) If the court finds the petition is sufficient, the court shall schedule a hearing within ten days to determine whether the document is a wrongful lien.
(c) The record interest holder shall serve a copy of the petition on the lien claimant and a notice of the hearing pursuant to Rules of Civil Procedure, Rule 4, Process.
(d) The lien claimant is entitled to attend and contest the petition.

(4) A summary proceeding under this section is only to determine whether or not a document is a wrongful lien. The proceeding shall not determine any other property or legal rights of the parties nor restrict other legal remedies of any party.
(5) (a) Following a hearing on the matter, if the court determines that the document is a wrongful lien, the court shall issue an order declaring the wrongful lien void ab initio, releasing the property from the lien, and awarding costs and reasonable attorney's fees to the petitioner.
(b) (i) The record interest holder may record a certified copy of the order with the county recorder.
(ii) The order shall contain a legal description of the real property.
(c) If the court determines that the claim of lien is valid, the court shall dismiss the petition and may award costs and reasonable attorney's fees to the lien claimant. The dismissal order shall contain a legal description of the real property. The prevailing lien claimant may record a certified copy of the dismissal order.
(6) If the district court determines that the lien is a wrongful lien as defined in Section **38-9-1**, the wrongful lien is void ab initio and provides no notice of claim or interest.
(7) If the petition contains a claim for damages, the damage proceedings may not be expedited under this section.

Utah Code Ann. 38-1-25. Abuse of lien right -- Penalty.

(1) Any person entitled to record or file a lien under Section **38-1-3** is guilty of a class B misdemeanor who intentionally causes a claim of lien against any property containing a greater demand than the sum due to be recorded or filed:
(a) with the intent to cloud the title;
(b) to exact from the owner or person liable by means of the excessive claim of lien more than is due; or
(c) to procure any unjustified advantage or benefit.
(2) In addition to any criminal penalties under Subsection (1), a person who violates Subsection (1) is liable to the owner of the property or an original contractor or subcontractor who is affected by the lien for the greater of:
(a) twice the amount by which the abusive lien exceeds the amount actually due; or
(b) the actual damages incurred by the owner of the property.

STATEMENT OF THE CASE

Appellant (herein after Judston) is a contractor who performed work and improvements for certain real property owned by Appellee (herein after Fothill). Judston filed notices of a claim of lien under Utah Code Ann. § 39-1- et seq. Foothill brought an action under UCA § 38-9-1 et. seq. (Wrongful Lien Statue) for an expedited hearing to declare Judston's lien claim a wrongful lien and void same. Judston counter-claimed to enforce the lien claim. The matter came before the Court Trial Court for expedited hearing on February 5, 2007.

The trial court found that the notice of claim of lien filed on July 14, 2006, was filed before final completion of the work as defined by UCA§ 38-1-7, and therefore timely for purposes of UCA §38-1-7. (Record 0198 and Transcript page 35 line 10). An action was filed to foreclose the lien claimed therein within 180 days of the filing of same pursuant to UCA § 38-1-11, when Judston filed its answer and Counterclaim on October 12, 2006. (Record 0029 and 0026)

The trial court granted Foothill's Motion for an Expedited Hearing pursuant to UCA§38-9-1 et. seq.. The trial court held that Judston's lien rights were extinguished when Judston did not file an action to foreclose a lien within 180 days of the filing of a prior notice of claim of lien. The trial court held that Judston's July 14, 2006 notice of claim of lien constituted a wrongful lien.

STATEMENT OF FACTS

1. Judston filed a Notice of Lien on September 24, 2004 in the amount of $ 120,246.13 . (Record 0198 *Findings of Facts Conclusions of Law*).

2. On January 11, 2005 Judston filed an amended Notice of Lien in the amount of $82,749.67. (Record 0198 *Findings of Facts Conclusions of Law*).

3. No action was filed to enforce the lien claim within 180 days of either filing. (Record 0198 *Findings of Facts Conclusions of Law*).

4. On July 14, 2006 Judston filed a Notice of Lien in the amount of $ 98,017.91. (Third Notice of Lien). (Record 0198 *Findings of Facts Conclusions of Law*).

5. On October 4, 2006 Foothill filed a Complaint of Wrongful Lien (Record 009)

6. On October 12 , 2006, Judston filed an Answer, Counterclaim and Third Party Complaint (Record 0029) seeking to enforce lien rights pursuant to the notice of lien filed July 14, 2006 and Utah Code 38-1-11. (Record 026)

7. The July 14, 2006 Notice of Lien filed by Judston was filed prior to final completion of the original contract. (Record 0198 and Transcript page 35 line 10).

8. All notice of Lien filings relate to the same work last performed on or about August 17, 2004. (Record 0198).

SUMMARY OF ARGUMENT

1. The trial court erred when it found as a matter of law that Judston's right to file a lien claim had been extinguished and that the notice of lien of July 14, 2007 constituted a wrongful lien.

2. The trial court erred in the application of procedures under Utah Code Annotated 38-9 et.seq (Wrongfull Lien) to the present case because UCA § 38-9 et. seq. is by in own terms inapplicable to notices of claim of lien filed under UCA§ 38-1 et. seq. Provisions of UCA § 38-1 et. seq dealing with the manner and timing of filing of a notice of claim of lien do not define who is entitled to file a lien under UCA § 38-1 et. seq. and thus defects in the timing or manner of the filing of a notice of claim of lien under UCA § 38-1 et. seq. do not remove the claimant from the statutory exception of UCA § 38-9-1(6)(b). Furthermore, UCA § 38-1 et seq. contains its own provisions at UCA § 38-1-25 for treatment of improperly filed notices of claim of lien.

ARGUMENT

1. The trial court erred when it found as a matter of law that Judston's right to file a lien claim had been extinguished and that the notice of claim of lien of July 14, 2007 constituted a wrongful lien.

Judston's rights to file a notice of claim of lien arose under Utah Code Ann. §38-1-3 which provides that contractors " shall have a lien upon the property upon or concerning which they have rendered service, performed labor, or furnished or rented materials or equipment...". Utah Code Ann. § 38-1-7 details the procedure for filing a notice of claim and the requirement that such be filed within 90 days of after the date of final completion of the original contract. The section goes on to statutorily define "final completion". Utah Code Ann § 38-1-11 (b)(2) provides for the time for enforcement of such claim by filing " an action to enforce the lien filed under this chapter within 180 days from the day on which the lien claimant filed a notice of claim under Section 38-1-7."

Judston filed the first notice of claim of lien on September 24, 2004 and subsequently amended same on January 11, 2005 (Record 0198). Judston did not pursue enforcement of said notice of lien within 180 days of the original or amended filing. On July 14, 2006 Judston filed a lien in regards to the same work performed on the same property of Foothill. As of July 14, 2006 final completion of the original contract had not occurred with in the meaning of Utah Code 38-1-7 and thus the filing of this notice of claim of lien was timely. Judston file an action to enforce said lien on October 14, 2006 , within 180 days of having filed the notice of claim of lien.

Judston complied with the plain meaning of the statue in regards to timely filing and enforcement of its July 14, 2006 notice of claim of lien, which was the only notice of claim of lien before the Court. Despite this fact the trial court applied its reading of

AAA Fencing Company vs. Raintree Development and Energy Company 714 P.2d 289 and Utah Code Ann. § 38-1-11(3)(2006) (currently re-numbered as paragraph (4) (a)&(b)) in determining that Judston had previously lost the right to file any notice of claim of lien including, specifically the July 14, 2007 notice of claim of lien, because it had previously filed a notice of claim of lien for the same work, which notice of claim had become void. (Record 0197 paragraphs 6 & 7).

The issue before the court in *AAA Fencing Company vs. Raintree Development and Energy Company* 714 P.2d 289 was wether failure to enforce a mechanics lien within the statutory period was a procedural limitation which could be subject to waiver, or a jurisdictional limitation which if not met deprived the Court of jurisdiction to adjudicate the lien claim. The *AAA Fencing Company* court at page 291 held that " it is jurisdictional and forecloses their rights." the court further stated at page 292,

> " The time for enforcing mechanic's liens set out in section 38-1-11, supra, limits a lienor's rights to twelve months after his work is completed. At that point, both his rights and his remedies under the statue are extinguished."

Foothill argued and the trial court agreed that the holding of *AAA Fencing Company* applied to bar Judston's July 14, 2007 filing of notice to claim a lien because Judston had not filed an action to enforce its prior notice of claim of lien.

AAA Fencing Company is inapplicable to the present case. The lien claim rights of the claimant in *AAA Fencing Company* where bound up in a single notice of claim of lien filing and when the claimant failed to file a timely enforcement action the

claimant's rights were extinguished because the claimant had no other basis to assert or enforce such rights. The *AAA Fencing Company* Court was not considering and did not hold that the expiration of one notice of claim of lien might bar the subsequent filing of a otherwise timely notice of claim of lien. In *AAA Fencing Company*, both the lien claimant's time to file a notice of claim of lien and the time for enforcement ran from the completion of the original contract, with the time for filing a notice of claim of lien expiring before the time for enforcement. Due to substantial changes in UCA§ 38-1- et. seq. the present case is different.

In the first instance a lien claimant's time to file an action to enforce a lien now runs from the date of filing of a notice of claim rather that from the date of "final completion". Specifically, UCA § 38-1-11 (2) provides " A lien claimant shall file an action to enforce the lien filed under this chapter within 180 days from the day on which the lien claimant filed a notice of claim under Section 38-1-7." In the present case Judston's right to file a timely notice of claim extended several years after the date work was last performed because "final completion" had not occurred. (Record 0198). It is not disputed that Judston's July 14, 2006 filing of a notice of claim was timely in that it was filed before "final completion" as required by UCA§ 38-1-7(1)(a)(ii). Judston filed an enforcement action within 180 of having filed " a notice of claim", specifically the July 14, 2006 notice of claim.

The holding of *AAA Fencing Company* and the plain meaning of Utah Code Ann. §38-1-11(3)(2006) (currently re-numbered as paragraph (4) (a)&(b)), do not prohibit

the filing of a subsequent notice of claim , where such is timely, and not previously adjudicated. The provisions of Utah Code Ann. § 38-1-11(3)(2006) (current re-numbered as paragraph (4) (a)&(b)) simply provide an automated mechanism for disposition of notices of claim which have not been enforced within 180 days of filing of the notice. Nothing in the plain language of UCA § 38-1 - et. seq. established any prohibition or limitation on a claimant's filing of successive or multiple notice of claim of lien so long as such are timely filed.

It is conceivable that a person entitled to file a notice of claim of lien may file such a claim, substantial time may pass, and the time to enforce the notice of claim of lien may be set to expire rendering the notice of claim automatically void. If that claimant knows that their time to file a notice of claim has not and will not run out for at lease some future time, the claimant may, due to resumptions of payment, on going negotiations or otherwise, chose not to file an action to enforce lien rights pursuant to one or more notice of claim. In fact, a claimant may even release a notice of claim, rightly relying upon the plain meaning of the statue which would permit re-filing of a notice of claim at any time within 90 days of "final completion".

Ultimately the property owner controls the length of time in which a claimant may file a notice of claim of lien. The time for filing is cutoff by "final completion" which in most cases consists of the property owner obtaining either a certificate of occupancy or passing final inspection. UCA§ 38-1-7(1)(a)(ii). The statutory definition of "final completion" in terms of a certificate of occupancy or final inspection creates a

bright line test based upon readily available public records by which to determine the cut off date for filing notices of claim of lien. Thus, any person with an interest in property potentially subject to filing of a notice of claim of lien may readily determine wether potential claimants have time remaining in which to file a notice of claim of lien.

" The purpose and intent of Utah's Mechanics' Lien Act, Utah Code Ann. § 38-1-1 to -29 (2001), "'manifestly has been to protect, at all hazards, those who perform the labor and furnish the materials which enter into the construction of a building or other improvement.'" *John Wagner Assocs. v. Hercules, Inc.*, 797 P.2d 1123, 1125 (Utah Ct. App. 1990) (quoting *Rio Grande Lumber Co. v. Darke*, 167 P. 241, 244 (Utah 1917)). Lien statutes should be broadly construed "to effectuate that purpose." *Interiors Contracting v. Navalco*, 648 P.2d 1382, 1386 (Utah 1982)." *Sill v Hart* , 2007 UT 45. In light of the purpose and intent of the Mechanic's Lien Act, the requirements thereof should be liberally construed in favor of preserving the rights and remedies of lien claimants. The Court should not read into the act any requirements or restrictions not specifically set forth. Where no provision of the Act prohibits successive filing or re-filing of a notice of claim of lien, and such is otherwise timely, the claimant is permitted to do so.

In this case Judston was a person entitled to file a notice of claim of lien because Judston had provided services to the property. Judston's filing of notice of claim of lien filed July 14, 2006 was timely as "final completion" had not occurred . No provision of

provision of UCA, Title 38, Chapter 1 prohibited Judston from filing the July 14, 2006 notice of claim of lien. The provisions of Utah Code Ann. § 38-1-11(3)(2006) (current re-numbered as paragraph (4) (a)&(b)) operate simply to void any prior notice of claim of lien which was not enforced, and do not prohibit subsequent filing of an otherwise timely notice of claim of lien. Consequentially, Judston's notice of claim of lien of July 14, 2007 was not wrongful within the meaning of UCA § 38-9-1 et.seq.

2. The trial court erred in the application of procedures under Utah Code Annotated 38-9 et. seq. (Wrongfull Lien) to the present case because UCA § 38-9 -1 et. seq. is by in own terms inapplicable to notices of claim of lien filed under UCA§ 38-1-1 et. seq. The trial court held that " a person who files an untimely mechanics lien is not as a matter of law entitled to a lien under 38-1-1 et. seq." (Record 0197 paragraph 3), and " An untimely filed mechanics lien may constitute a wrongful lien under Section 38-9-1 et. seq., and properly be the subject of a motion to nullify a wrongful lien." (Record 0197 paragraph 4).

Utah Code Ann § 38-9-2 (3) defines the scope of the wrongful lien statue, UCA§ 38-9-1 et. seq, and specifically states " This chapter does not apply to a person entitled to a lien under Section 38-1-3 who files a lien pursuant to Title 38, Chapter 1, Mechanic's Liens." In *Sill v Hart* 2007 UT 45 the Supreme Court stated,

"Under our rules of statutory construction, we look first to the statute's plain language to determine its meaning." *Sindt v. Ret. Bd.*, 2007 UT 16, ¶¶ 8, __ P.3d __ (internal quotation marks omitted). We read "[t]he plain language of a statute . . . as a whole" and interpret its provisions "in harmony with other provisions in the same statute and with other statutes under the same and related chapters." *State v. Schofield*, 2002 UT 132, ¶¶ 8,63 P.3d 667 (internal quotation marks omitted). We do so because "'[a] statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole.'" *State v. Maestas*, 2002 UT 123, ¶¶ 54, 63 P.3d 621 (quoting Norman J. Singer, 2A Sutherland *Statutory Construction* §§ 96:05 (4th ed. 1984))."

In reaching the conclusion that an untimely file notice of claim of mechanic's lien may constitute a wrongful lien under UCA§ 38-9-1 et. seq. the trial court has failed to give meaning to the plain language of UCA§ 38-9-2(3). The trial court has also failed to give meaning to UCA § 38-1-3 which defines those entitled to lien, or to UCA § 38-1-25 which provides for treatment of improperly filed notices of claim of lien under UCA § 38-1-1 et. seq. In holding that a person filing an untimely mechanics lien is not as a matter of law entitled to a lien under 38-1-1 et. seq. the trial court has confused the procedural and temporal requirements of filing a notice of claim of lien under UCA §

38-1-7 and 38-1-11, with the identification of the person entitled to file a lien under UCA § 38-1-3. Under the trial court's analysis any defense to the filing or enforcement of a notice of claim of lien under UCA§ 38-1-1 et. seq. could result in a determination not only invalidating the notice of claim of lien or denying enforcement under UCA§ 38-1-1 et seq. but also to a determination of wrongful lien under UCA §38-9-1 et. seq. The circular nature of the trial court's reasoning casts a result in which a party defending against a mechanics lien claim filed under UCA § 38-1-1 et. seq. could assert any defense in an expedited action under UCA§ 38-9-1 et. seq. and if successful the court could hold that UCA § 38-9-2(3) does not apply to the claimant, because the claimant is not a person entitled to file a lien under Section 38-1-3 .

The intention of the legislature in enacting the Wrongful Lien state of UCA§ 38-9-1 et. seq was to provide an expedited procedure for resolution of lien claims base on documents recorded or filed not " (a) expressly authorized by this chapter or another state or federal statute; (b) authorized by or contained in an order or judgment of a court of competent jurisdiction in the state; or (c) signed by or authorized pursuant to a document signed by the owner of the real property." UCA § 38-9-1(6). The Wrongful Lien statue was not intended to provide a procedure or forum for expedited or summary disposition of mechanics lien claims or other lien claims specifically permitted by separate statue. UCA § 38-1-25 provides the appropriate remedy for improper claims filed under the mechanics Lien Statue of UCA § 38-1-1 et. seq.

CONCLUSION

For the foregoing reasons, Judston respectfully asks this Court to overturn the trial court's ruling that Judston's notice of claim of lien filed July 14, 2006 was untimely and constituted a wrongful lien . Judston also asks this Court to overturn the trial court's ruling finding the wrongful lien procedure of UCA§ 38-9-et. seq., applicable to Judston's July 14, 2006 notice of claim of lien.

RESPECTFULLY SUBMITTED:

Date: September 18, 2007

Dane L Hines,
Attorney for
Defendant/Appellant

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing APPELLANT'S OPENING BRIEF was mailed by first class mail this September 19, 2007 to the following:

Charles W. Hanna,
223 West Bulldog Blvd, Ste 200
Provo, Utah 84604

Date: 9/19/07

Dane L Hines

ADDENDUM

ADDENDUM

Charles W. Hanna (Bar No. 1326)
223 West Bulldog Ave. Suite 200
Provo, Utah 84604
Telephone: (801) 375-3650
Fax: (801) 375-3670

**IN THE FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH AMERICAN FORK DEPARTMENT**

FOOTHILL PARK, L.C. a Utah Limited Liability Company, **Plaintiff** **vs.** **JUDSTON, INC., a Utah Corporation,** **Defendant** **JUDSTON, INC., a Utah Corporation,** **Counterclaimant and Third Party Plaintiff** **vs.** **NORTHSTAR COMPANIES, INC., a Utah Corporation** **Third Party Defendant**	**FINDINGS OF FACT AND CONCLUSIONS OF LAW** **CASE NO. 060102680** **Judge: Pullan**

A hearing on Plaintiff Foothill Park, L.C.'s Motion to Annul a Wrongful Lien came on regularly before the Court on February 5, 2007, the Plaintiff being present and represent by its attorney Charles W. Hanna and the Defendant being present and represented by its attorney Dane

L. Hines and the Court having read the memorandums filed herein heard the argument of counsel now hereby makes its Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Defendant Judston, Inc., has filed three mechanic's liens against the real property owned by Plaintiff Foothill Park, L.C.

2. On September 24, 2004, Judston Inc. filed a lien against the real property of Foothill Park, L.C. in the amount of $120,246.13.

3. On January 11, 2005, Judston, Inc. filed an Amended Lien in the amount of $82,749.67

4. Judston, Inc. did not file an action to foreclose either its September 2004 lien or its January 2005 lien within the 180 days required by Section 38-1-11(1).

5. On July 14, 2006, Judston Inc. filed a lien in the amount of $98,017.91.

6. All three liens filed by Defendant Judston Inc., relate to the exact same work which was completed on August 17, 2004.

7. The third lien filed by Judston Inc., was filed before a final inspection of the work of Judston Inc., had been performed.

CONCLUSIONS OF LAW

1. This matter comes before the Court on Petitioner's Motion to Nullify a Wrongful Lien filed pursuant to 38-9-7 U.C.A.

2. The Wrongful Lien Statute by its terms cannot apply to a person entitled to a lien under the Mechanic's Lien Statute 31-1-1 et seq., as a lien authorized by Statute is exempted from the definition of a wrongful lien by Section 38-9-1(6) (b).

3. A person who files an untimely mechanics lien is not as a matter of law entitled to a lien under 38-1-1 et seq.

4. An untimely filed mechanics lien may constitute a wrongful lien under Section 38-9-1 et seq., and properly be the subject of a motion to nullify a wrongful lien.

5. This court holds that the July 2006 lien filed by Defendant Judston, Inc., constitutes a wrongful lien.

6. The failure of Defendant Judston, Inc., to file an action to foreclose its September 2004 and January 2005 mechanic's liens within the 180 days provided in Section 38-1-11(1) extinguished any lien rights associated with these liens pursuant to the holdings of the Utah Supreme Court in AAA Fencing Company vs. Raintree Development and Energy Company 714 P.2d 289 and Projects Unlimited, Inc., vs. Copper State Thrift & Loan Co. 798 P.2d 738. Once these lien rights have been extinguished as a matter of law, this court lost subject matter jurisdiction and cannot adjudicate a lien which has become void for this reason.

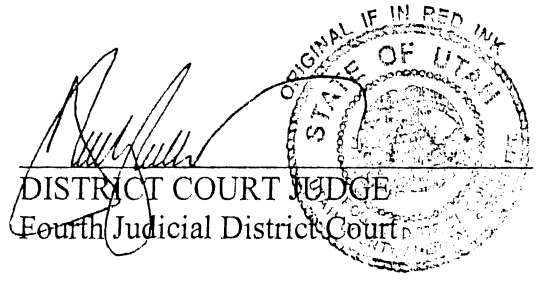
7. The holdings of the Utah Supreme Court in AAA Fencing Company vs. Raintree Development and Energy Company 714 P.2d 289 and Projects Unlimited, Inc., vs. Copper State Thrift & Loan Co. 798 P.2d 738 have been codified in section 38-1-11(3) which became effective on May 1, 2006 prior to Defendant Judston Inc., filing its third mechanic's lien in July 2006.

8. The subsequent filing of Defendant Judston, Inc., of the July 2006 mechanic's lien after its right to file or enforce a mechanic's lien had been extinguished as a matter of law constituted the filing of a wrongful lien.

9. Plaintiff Foothill Park, L.C. is entitled to $1,000.00 statutory damages pursuant to 38-9-1 U.C.A. and to an award of its attorney's fees and costs. See Affidavit of Attorney Fees and Costs filed herewith.

DATED AND SIGNED this 26 day of March, 2007.

BY THE COURT:



DISTRICT COURT JUDGE
Fourth Judicial District Court

2007 UTSC 20060106 - 060807; Sill v. Hart;

Joel Sill, Plaintiff and Respondent,
v.
Bill Hart dba Hart Construction, Defendant and Petitioner.

Nos. 20060106, 20060208
Supreme Court of Utah
June 8, 2007

On Certiorari to the Utah Court of Appeals, Third District, Silver Summit, The Honorable Deno Himonas No. 020500012,

Attorneys: David B. Thompson, Christina Inge Miller, Park City, David L. Arrington, Salt Lake City, for plaintiff Robert J. Dale, P. Bruce Badger, Bradley L. Tilt, Salt Lake City, for defendant

DURHAM, Chief Justice:

BACKGROUND

¶1 This case involves a dispute between a property owner and a contractor in the construction of a private residence. Joel Sill, a residential property owner, entered into an agreement with Bill Hart, a general contractor, to construct a custom home in Summit County. Construction of the residence began in June 1999 and continued until December 2001 when the parties had a falling-out regarding completion of the residence. Hart stopped work on Sill's property, leaving the residence unfinished. In response, Sill filed this suit alleging various claims including breach of contract. Hart counterclaimed alleging breach of contract and unjust enrichment and seeking to foreclose a mechanics' lien for work for which Hart had yet to be paid. More than two and a half years after the suit was initiated, Sill challenged the enforceability of Hart's mechanics' lien for failing to meet the notice requirements of section 38-1-11(4)(a) of the Mechanics' Lien Act.(fn1) The parties stipulated that all issues concerning the enforceability of the lien would be preserved until after the jury reached a verdict at trial. Following the trial, the jury awarded Hart $314,500 for his unjust enrichment and mechanics' lien claims and included an award for prejudgment interest, attorney fees, and costs.

¶2 When Hart sought to reduce the jury verdict to a judgment, the court considered Sill's challenge to the validity of the mechanics' lien. Hart admitted that he did not serve Sill with any of the required forms or instructions informing the owner of his LRFA rights as required by section 38-1-11(4)(a) (2001). He argued, however, that the notice requirements did not apply to this case because (1) Sill, the owner, not Hart, the contractor, commenced the action; (2) Sill had no rights under LRFA because Hart was not a subcontractor; and (3) Hart, the general contractor, had not been paid in full. Sill argued that Hart's failure to serve him with the notice requirements of section 38-1-11(4)(a) created a complete jurisdictional bar to the enforcement of the lien.

¶3 The trial court concluded that Hart was not required to comply with the notice requirements of section 38-1-11(4)(a) because he filed a counterclaim, not a complaint. Accordingly, the court enforced his mechanics' lien. The court of appeals reversed, concluding that the notice requirements of section 38-11(4)(a) are triggered whenever an action is filed seeking to enforce a lien on a residence, regardless whether the lien claimant files a complaint or a counterclaim. *Sill v. Hart*, 2005 UT App 537, ¶ 9, 128 P.3d 1215. The court of appeals rejected Sill's assertion that failure of a lien claimant to comply with section 38-1-11(4)(a) is a jurisdictional bar and concluded instead that the failure constitutes an affirmative defense. *Id.* ¶¶ 14-15.

¶4 We granted certiorari to determine whether the requirements of Utah Code section 38-1-11(4)(a) apply to counterclaims, whether those requirements apply regardless of the remedies available to a property owner under LRFA, and whether a failure to comply with section 38-1-11(4)(a) creates a jurisdictional bar to adjudication of an action to enforce a lien. We have jurisdiction pursuant to Utah Code section 78-2-2(3)(a), (5) (2002).

STANDARD OF REVIEW

¶5 "On certiorari, we review the decision of the court of appeals, not the trial court." *Fla. Asset Fin. Corp. v. Utah Labor Comm'n*, 2006 UT 58, ¶ 8, 147 P.3d 1189 (internal quotation marks omitted). This case presents an issue of statutory interpretation, a question of law that we review for correctness. *Id.*

ANALYSIS

¶6 Hart argues that the court of appeals' determination that the notice requirements of section 38-1-11(4)(a) extend to counterclaims should be reversed. He also argues that the notice requirements do not apply and therefore do not need to be complied with when an owner has no available rights under LRFA. Additionally, Hart argues that failure to comply with section 38-1-11(4)(a) creates an affirmative defense, not a jurisdictional bar. We agree with each of his arguments.

¶7 "Under our rules of statutory construction, we look first to the statute's plain language to determine its meaning." *Sindt v. Ret. Bd.*, 2007 UT 16, ¶ 8, __ P.3d __ (internal quotation marks omitted). We read "[t]he plain language of a statute . . . as a whole" and interpret its provisions "in harmony with other provisions in the same statute and with other statutes under the same and related chapters." *State v. Schofield*, 2002 UT 132, ¶ 8, 63 P.3d 667 (internal quotation marks omitted). We do so because "'[a] statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole.'" *State v. Maestas*, 2002 UT 123, ¶ 54, 63 P.3d 621 (quoting Norman J. Singer, 2A Sutherland *Statutory Construction* § 96:05 (4th ed. 1984)).

¶8 The purpose and intent of Utah's Mechanics' Lien Act, Utah Code Ann. §§ 38-1-1 to -29 (2001), 'manifestly has been to protect, at all hazards, those who perform the labor and furnish the materials which enter into the construction of a building or other improvement.'" *John Wagner Assocs. v. Hercules, Inc.*, 797 P.2d 1123, 1125 (Utah Ct. App. 1990) (quoting *Rio Grande Lumber Co. v. Darke*, 67 P. 241, 244 (Utah 1917)). Lien statutes should be broadly construed "to effectuate that purpose." *Interiors Contracting v. Navalco*, 648 P.2d 1382, 1386 (Utah 1982). The broad remedial powers of the Mechanics' Lien Act, however, have been tempered by enactment of LRFA and the legislature's recognition of the competing interest of owners of residential property to keep their credit and title to the property clear of unwarranted encumbrances.

¶9 Thus, the Mechanics' Lien Act requires certain acts by lien claimants in order to protect owners of residential property. Section 38-1-11(4) (2001) provides:

> (a) If a lien claimant files an action to enforce a lien filed under this chapter involving a residence . . . the lien claimant shall include with the service of the complaint on the owner of the residence:
>
> (i) instructions to the owner of the residence relating to the owner's rights under Title 38, Chapter 11, [LRFA]; and

(ii) a form affidavit and motion for summary judgment to enable the owner of the residence to specify the grounds upon which the owner may exercise available rights under Title 38, Chapter 11, [LRFA].

. . .

(e) If a lien claimant fails to provide to the owner of the residence the instructions and form affidavit required by Subsection (4)(a), the lien claimant shall be barred from maintaining or enforcing the lien upon the residence.(fn2)

¶10 The first issue we must resolve is whether the notice requirements of section 38-1-11(4)(a) apply o counterclaims. We conclude that they do not. It has long been established that the purpose of the Mechanics' Lien Act is "to provide protection to those who enhance the value of a property by supplying abor or materials." *AAA Fencing Co. v. Raintree Dev. & Energy Co.*, 714 P.2d 289, 291 (Utah 1986). We have also recognized the "modern trend" in mechanics' lien cases "to dispense with arbitrary rules vhich have no demonstrable value in a particular fact situation." *Projects Unlimited, Inc. v. Copper State Thrift & Loan Co.*, 798 P.2d 738, 744 (Utah 1990) (upholding lien against attack where leficiencies were technical and did not prejudice the defendant). It is against this backdrop that we onsider the notice requirements of section 38-1-11(4)(a).

¶11 The pertinent language of section 38-1-11(4)(a) provides, "If a lien claimant *files an action* to nforce a lien filed under this chapter involving a residence . . . the lien claimant shall include with the *ervice of the complaint on the owner of the residence* . . ." (emphasis added). Looking to the plain anguage of the statute, "we assume that each term in the statute was used advisedly; thus the statutory vords are read literally, unless such a reading is unreasonably confused or inoperable." *State v. Bluff*, 002 UT 66, ¶ 34, 52 P.3d 1210 (internal quotation marks omitted). The plain language of section 38-1-1(4)(a) supports the trial court's interpretation that the notice requirements are applicable only at the nitiation of an action through service of a complaint, not a counterclaim. The language is not mbiguous. The "fil[ing of] an action" is qualified by the reference to the "service of the complaint on ıe owner of the residence." Thus, a "complaint" refers to a pleading that is filed by a plaintiff at the ommencement of a lawsuit requiring service, not on an attorney, but on an individual at his residence. he filing of such an "action" does not include liens enforced by counterclaim where the action has lready been commenced and the service of the lien is on the residential property owner's legal counsel. n3)

¶12 This narrow reading of "action" is also supported by the overarching purpose of the Mechanics' ien Act and the narrow protection LRFA is intended to provide. As noted previously, the purpose of ıe Mechanics' Lien Act is to protect original contractors, subcontractors, and others who enhance the alue of real property through improvements. LRFA also protects residential property owners against ıe substantial costs associated with litigation arising from an unwarranted mechanics' lien. Utah Code nn. § 38-11-107 (2001). Thus, the need for LRFA protection exists when actions are commenced by a en claimant, before litigation costs have been incurred by the property owner. Such actions are ommenced when a complaint is filed and served on a property owner. *See* Utah R. Civ. P. 3(a) ("A civil tion is commenced by (1) filing a complaint . . . or (2) by service of a summons together with a copy the complaint . . . ."). The notice requirements of section 38-1-11(4)(a) simply do not apply to liens ought to be enforced through counterclaims because any benefit that could be derived from LRFA otections has been relinquished by the property owner who has already initiated legal proceedings. In is case, because Sill had already hired an attorney, initiated legal action, and incurred costs, the otections provided by LRFA would not, and were not intended to, benefit him. Moreover, service of e counterclaim was required by the Rules of Civil Procedure to be on Sill's counsel, not the "owner of e residence." Utah Code Ann. § 38-1-11(4)(a). Any benefit that Sill could have derived from the notice

requirements was clearly moot at that juncture. Instructions informing him how to defeat the lien without significant litigation costs were irrelevant because he had already hired an attorney and engaged in litigation by initiating this action against the contractor.

¶13 While the use of the word "complaint" may be broadly interpreted to include counterclaims in some situations,(fn4) a statutory interpretation construing the language of section 38-1-11(4)(a) to include liens enforced by counterclaim is too expansive because such an interpretation runs counter to the purpose and context of the Mechanics' Lien Act, the plain language of section 38-1-11(4)(a), and the narrow scope of protection LRFA was intended to provide.

¶14 Next, we must determine whether section 38-1-11(4)(a) applies regardless of the remedies available to the property owner under LRFA. LRFA protects homeowners from having to pay twice for the same improvements. *Id.* §§ 38-11-107, 38-11-204(3)(b) (2001). It does so by providing that once the homeowner has paid the general contractor in full, the homeowner and the home are then free from claims and liens of subcontractors who also worked on the home. *See, e.g., id.* § 38-11-107(1) (providing owners relief only against parties with agreements "other than directly with the owner"); *id.* § 38-11-204(3)(b) (providing owners relief only after the owner "has paid in full the original contractor"); *id.* § 38-11-102(14) (defining "original contractor" as "a person who contracts with the owner of real property"). In such cases, LRFA instructions and the forms referenced in section 38-1-11(4)(a) allow the owner of a residence to dispose of the case quickly and easily, without having to incur the expenses of litigation.

¶15 Looking to the whole statutory framework of the Mechanics' Lien Act and the limited protections LRFA was intended to provide, we hold that where a lien claimant seeks to enforce a lien on a property owner with no rights available under LRFA, compliance with the notice requirements of section 38-1-11(4)(a) is not required. However, a lien claimant who chooses not to comply with section 38-1-11(4)(a) does so at her own peril and risks losing her cause of action if mistaken as to the applicability of the requirements.

¶16 In this case, however, LRFA does not provide Sill with a remedy. Sill had not paid the original contractor, Hart, in full. Thus, Sill had no right or protection available under LRFA. Had he been served with the notices required by section 38-1-11(4)(a), they would have been useless to him as he had no available rights" to "exercise" under LRFA. *Id.* § 38-1- 11(4)(a)(i), (ii). Furthermore, as explained above, once he initiated legal action, his need for protection against an unwarranted mechanics' lien without incurring the costs of litigation evaporated. Hart therefore was under no obligation to comply with the notice requirements of section 38-1-11(4)(a).

¶17 We note that if an owner has rights available to her under LRFA, the situation will be different. If a lien claimant seeks to enforce a mechanics' lien on the owner of residential property even though the improvement has been paid for in full, she may "be barred from maintaining or enforcing the lien upon the residence." *Id.* § 38-1-11(4)(e) (2001). If the notice requirements in fact apply, a contractor would be providing the owner with an affirmative defense pursuant to section 38-1-11(4)(e).

¶18 We agree with the court of appeals' conclusion in its review of this case, *Sill v. Hart*, 2005 UT App 537, ¶ 14, 128 P.3d 1215, and in *Pearson v. Lamb*, 2005 UT App 383, ¶ 15, 121 P.3d 717, that section 38-1-11(4)(e) does not act as a jurisdictional bar, but rather provides owners with an affirmative defense. Section 38-1-11(4)(e) (2001) provides that "[i]f a lien claimant fails to provide to the owner of the residence the instructions and form affidavit required by Subsection (4)(a), the lien claimant shall be barred from maintaining or enforcing the lien upon the residence." In *Pearson*, the court of appeals held that "failure to adhere to section 38-1-11(4)(a) [does] not divest the trial court of jurisdiction." 2005 UT App 383, ¶ 15. Similarly, because failure to comply with section 38-1-11(4)(a) raised a defense "'outside

or extrinsic to'" Hart's prima facie mechanics' lien claim, the court of appeals recognized that it was an affirmative defense. *Sill*, 2005 UT App 537, ¶ 15 (quoting *Prince v. Bear River Mut. Ins. Co.*, 2002 UT 68, ¶ 31, 56 P.3d 524).

¶19 In determining whether a statutory provision is jurisdictional, we begin with the presumption that "district courts retain their grant of constitutional jurisdiction in the absence of clearly expressed statutory intention to limit jurisdiction." *Labelle v. McKay Dee Hosp. Ctr.*, 2004 UT 15, ¶ 8, 89 P.3d 113. The notice requirements of section 38-1-11(4)(a) are merely directory in nature rather than mandatory and jurisdictional. A "designation is mandatory . . . if it is 'of the essence of the thing to be done.'" *Pearson*, 2005 UT App 383, ¶ 7 (quoting *Beaver County v. Utah State Tax Comm'n*, 919 P.2d 547, 552 (Utah 1996)). Hart's failure to include the instructions and forms "did not compromise the purpose of the [Mechanics' Lien] Act." *Pearson*, 2005 UT App 383, ¶ 8. Invalidating Hart's ability to be paid for his labor solely due to a procedural error that went unnoticed by Sill for more than two and a half years would "clearly contravene[] the intended purpose of the Mechanics' Lien Act." *Id.* ¶¶ 8, 14. Further, the notice requirements of section 38-1-11(4)(a) serve "a wholly informational role," are a "minor component" of the Mechanics' Lien Act, and are one of "numerous procedural hurdles to enforcing a lien." *Id.* ¶¶ 11, 12 (internal quotation marks omitted). Accordingly, the notice requirements concern only "the proper, orderly and prompt conduct of the business" and are therefore directory and not jurisdictional. *Id.* ¶ 12 (internal quotation marks omitted).

CONCLUSION

¶20 In sum, we hold that section 38-1-11(4)(a) is not triggered when a lien claimant seeks to enforce a lien by filing a counterclaim rather than an initial complaint. Further, when a lien claimant seeks to enforce a lien upon a property owner with no rights available under LRFA, compliance with the notice requirements of section 38-1-11(4)(a) is not required; however, the lien claimant bears the risk of providing an owner with an affirmative defense by disregarding the notice requirements in cases where they are applicable. We reverse the court of appeals and remand for further proceedings consistent with this opinion.

¶21 Associate Chief Justice Wilkins, Justice Durrant, Justice Parrish, and Justice Nehring concur in Chief Justice Durham's opinion.

Footnotes:

1. At the time Hart filed the mechanics' lien, Utah Code section 38-1-11(4)(a) required a party seeking to execute a lien against a residence to include with the service of the complaint upon the owner of the residence "instructions to the owner of the residence relating to the owner's rights under" the Residence Lien Restriction and Lien Recovery Fund Act (LRFA) and "a form affidavit and motion for summary judgment to enable the owner of the residence to specify the grounds upon which the owner may exercise available rights under" LRFA. Utah Code Ann. § 38-1-11(4)(a)(i), (ii) (2001) (amended Supp. 2006).

The Mechanics' Lien Act, *id.* §§ 38-1-1 to -29 (2001) (amended 2005 & Supp. 2006), "provide[s] protection to those who enhance the value of a property by supplying labor or materials," *AAA Fencing Co. v. Raintree Dev. & Energy Co.*, 714 P.2d 289, 291 (Utah 1986); *see also* Utah Code Ann. § 38-1-3, while LRFA, *id.* §§ 38-11-101 to -302 (2001) (amended 2005 & Supp. 2006), provides a narrow statutory framework for the protection of residential property owners. *Id.* § 38-11-107. LRFA allows owners to avoid incurring costs associated with litigation due to unwarranted mechanics' liens. *Id.*

2. Since 2001, section 38-1-11 of the Mechanics' Lien Act has been amended so that it no longer requires service of a summary judgment motion form. *See* Utah Code Ann. § 38-1-11(5)(a) (Supp. 2006).

3. Contrary to Sill's assertion, the court of appeals did not decide this question in *American Rural Cellular, Inc. v. Systems Communication Corp.*, 939 P.2d 185 (Utah Ct. App. 1997). In that case, the court held that the word "action" included complaints as well as counterclaims. *Id.* at 193. However, the particular portion of the Mechanics' Lien Act at issue in that case provided "'in *any action* brought to enforce *any* lien under this chapter . . . .'" *Id.* (emphasis added)(quoting Utah Code Ann. § 38-1-18 (Supp. 1996)). It was not qualified in any manner, unlike the language at issue in the case before us today where "action" is qualified as a "complaint" served "on the owner of the residence."

4. "A counterclaim is viewed as an original action, instituted by the defendant against the plaintiff and is tested by the same tests and rules as a complaint." *Harman v. Yeager*, 134 P.2d 695, 696-97 (Utah 1943) (concluding that an answer that did not set out a cause of action did not constitute a counterclaim).